

MEMO

To: BOCC
From: Neil A. Caulkins
Re: Response to comment on amendment to definition of gravel extraction and excavation
Date: November 17, 2010

Commissioner McClain requested that I respond to the comment submitted into the record in the annual comprehensive plan docket by Mr. Murphy on behalf of Ellensburg Cement Products regarding the proposed amendment to the county code definition of gravel extraction and excavation. As a preliminary matter, the board has the authority to seek comment and clarification from county staff, and the county has the ability, and sometimes even the responsibility, to respond to comments received. Hence, it is, by definition, appropriate for county staff to respond to public comments after those comments have been received, including after the record has been closed to the public.

The comment from Ellensburg Cement Products contains numerous falsehoods. The comment asserts that the only mining activity allowed in the county's "ag 20" zone is gravel excavation with a conditional use permit. KCC 17.29.020(16) allows gas and oil exploration and construction as an outright permitted use in "ag 20" and KCC 17.29.030(27) allows stone quarries as a conditional use in "ag 20." The comment also asserts that the county code regulating "ag 20" does not "use any generic language such as 'and associated activities' and thus does not support a more expansive reading of the language actually chosen: sand and gravel extraction." KCC 17.29.020(17) allows "Uses customarily incidental to any of the above uses" and KCC 17.29.020(18) allows "Any use not listed which is nearly identical to a listed use, as judged by the administrative official, may be permitted" as outright permitted uses. Therefore, language allowing equivalencies and related and necessary activities is in fact present in our code.

The comment mischaracterizes the county code when it contends that our code is consistent and carefully thought out to provide that the "R" zones are more industrial and the "ag" zones are more agricultural or even green. As an example, all of our "ag" zones (ag 20- KCC 17.29.030(16); ag 5-KCC 17.28A.020(18); and ag 3-KCC 17.28.020(17)) allow gas and oil exploration and construction as outright permitted uses, yet our "R" zones (R3-KCC 17.30.030(6); R5-KCC 17.30A.030(6); and Forest & Range-KCC 17.56.030(43)¹) all require a conditional use permit for gas and oil exploration and construction. That is inconsistent with the comment's contention that the latter are more industrial than the former. Indeed, our code contemplates certain industrial activities not being in conflict with agriculture. In addition to those industrial uses described above, all three "ag" zones allow "processing of products produced on the premises" and "uses customarily incidental to any" listed use as outright permitted uses. (ag 3-KCC 17.28.020(14) and (18); ag 5-KCC 17.28A.020(15) and (4); ag 20-KCC 17.29.020(13) and (18)). Additionally, all three "ag" zones (KCC 17.28.020(15); 17.28A.020(16); and

¹ Our Forest & Range functions essentially as R-20.

17.29.020(14)) allow logging, log processing, and portable sawmills as outright permitted uses. That clearly contemplates industrial activity as not being in conflict with agriculture.

The comment mischaracterizes the proposed amendment as having a disguised intent. Its intent is clear-to create a rational regulation of a certain type of mining, to allow certain activities that are part and parcel of a gravel operations, and to create consistency in our code. Gravel extraction and excavation involves several steps. First it is dug from the ground. Next it must be crushed to a more uniform size because it comes out of the ground as a bunch of different-sized rocks, not as uniform gravel from a vein of identically-sized pebbles. Next it must be sorted and washed. Our code, which haphazardly describes certain uses as permitted in certain zones and not others, does not create a rational regulation of mining because it, seemingly randomly, divides processes that belong together. The proposed code seeks to rationally regulate this activity by allowing its necessary parts to occur in the same location. This proposed code amendment also seeks to create code consistency in that it is currently incongruous to allow folks to dig rocks from the ground, but not to crush, sort, or wash on the same parcel when our code also provides (KCC 17.28.020(14); 17.28A.020(15); 17.29.020(13)) that “processing of products produced on the premises” is an outright permitted use. By allowing all the processes that are part and parcel of a gravel operation to be done wherever such operations are allowed will foster a rational regulation of and provision for such mining and create greater consistency within our code by allowing the processing of products produced on the premises to clearly also apply in the context of a gravel operation.²

The comment from Ellensburg Cement Products does make a legitimate point when it complains that the proposed amendment will unnecessarily deregulate asphalt and concrete batching. It was not the intent of county staff to, via this amendment, alter the regulation of asphalt and concrete batching. There already is another portion of proposed code that clarifies that area. Hence, based upon this comment and the presence of another amendment concerning batch plants, and because the purpose of the amendment is to promote clarity, I would suggest the following wording instead for KCC 17.08.475:

17.08.475 Sand & gravel extraction and/or excavation.

Sand & Gravel Extraction and/or excavation shall mean:

(a) The mining or extraction of rock, stone, gravel, sand, earth, and other minerals;

(b) Blasting, equipment maintenance, sorting, crushing, and loading;

(c) Transporting minerals to and from the mine, on site road maintenance, road maintenance for roads used extensively for surface mining activities, traffic safety, and traffic control.

² It is important to keep in mind that the county is not the only regulation of mining, and hence, amendment to our code will not create some sort of free-for-all. Whether as a permitted or conditional use, someone engaging in a gravel operation also needs a sand and gravel permit from the DOE. That is an annual permit and is monitored by that state agency. Additionally, one also would need a reclamation permit from the DNR at the close of the operation.

Ellensburg Cement Products has asserted the county's proposed amendment violates SEPA and the GMA, yet the county has complied with each act and there is no showing otherwise. SEPA requires a determination as to whether legislation will have a probable significant adverse environmental impact. RCW 43.21C.031(1). The county, as lead agency, makes a threshold determination after the responsible official has evaluated all impacts to be considered from the environmental checklist. WAC 197-11-310. Substantial weight is accorded an agency's threshold determination and it is a challenger's burden to show a violation. RCW 43.21C.090. The county has considered the relevant environmental factors as required by the act, and there has been no showing to the contrary. Finally, this regulation neither substantially increases the level of industrial activity in the rural area nor in any way impacts agricultural resource lands of long-term commercial significance, and so cannot constitute a violation of the GMA mandate for counties to protect agriculture and farming.